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COURT OF CRIMINAL APPEALS
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No. _____

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
8/2/2019
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS,
PETITIONER,

V.

SHEILA JO HARDIN,
RESPONDENT.

PETITION IN CAUSE NO. 17FC-1760G, FROM THE 319TH DISTRICT COURT OF NUECES COUNTY, TEXAS, AND CAUSE NO. 13-18-244-CR, IN THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS.

PETITION FOR DISCRETIONARY REVIEW

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The Thirteenth Court of Appeals erred in concluding that the officer who stopped Hardin's vehicle lacked reasonable suspicion to stop her for failing to maintain a single lane by swerving into another lane, whether or not this movement could be done safely.

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No. _____

THE STATE OF TEXAS,	**IN THE**
Petitioner,	
v.	**COURT OF CRIMINAL APPEALS**
SHEILA JO HARDIN,	
Respondent.	**OF TEXAS**

STATE'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through the District Attorney for the 105th Judicial District of Texas, and respectfully urges this Court to grant discretionary review of the above named cause for the reasons that follow:

STATEMENT REGARDING ORAL ARGUMENT

The State does not believe that oral argument would be helpful to the determination of the present appeal, which turns on recognized rules of statutory construction that may be adequately set forth in written briefing.

STATEMENT OF THE CASE

Sheila Jo Hardin was charged by indictment with the felony offenses of Fraud and Forgery. (CR p. 5) She filed a motion to suppress based on lack of reasonable suspicion to conduct the traffic stop during which evidence of the offenses in question was found (CR p. 40), which the court granted on February 22, 2018. (CR p.44).

STATEMENT OF PROCEDURAL HISTORY

A panel of the Thirteenth Court of Appeals affirmed the trial court's suppression order in an unpublished opinion on August 1, 2019. (See Appendix 1). The State did not file a motion for rehearing.

GROUND PRESENTED FOR REVIEW

The Thirteenth Court of Appeals erred in concluding that the officer who stopped Hardin's vehicle lacked reasonable suspicion to stop her for failing to maintain a single lane by swerving into another lane, whether or not this movement could be done safely.

ARGUMENT

At the suppression hearing, Corpus Christi Police Officer David Alfaro, testified that he conducted a traffic stop on a vehicle (later identified as Ms. Hardin's vehicle (RR vol. 2, p. 10)) for failing to maintain a single lane of travel. (RR vol. 2, p. 5-6). Specifically, Officer Alfaro observed Hardin's vehicle's tires cross the white line and ride for a couple seconds on the other side of the lane. (RR vol. 2, p. 9) The State later played a recording of the traffic violation (RR vol. 2, p. 16), which was admitted into evidence as SX # 1. (RR vol. 2, pp. 20-21)

After granting the motion to suppress, the trial court made written findings of fact, including specifically that: "The trial court finds credible the testimony of Corpus Christi Police Officer D. Alfaro that on April 23, 2017, he observed Sheila Jo Hardin's vehicle traveling on the highway in front of

him in the marked center lane of travel, and that he initiated a traffic stop for failure to maintain a single lane after he observed Hardin's tires cross over the striped lines marking the center lane without Hardin signaling a lane change, although there were no other vehicles in the vicinity at the time or any other circumstance to suggest that this movement was unsafe." The trial court concluded that the officer lacked reasonable suspicion to detain Hardin. (1st Supp. CR p. 15)

In its opinion affirming the trial court's suppression order, the Thirteenth Court of Appeals effectively concluded that failing to maintain a single lane is not a traffic violation for which a motorist may be stopped unless there is also evidence that this movement was unsafe.

The Transportation Code requires that an operator on a roadway divided into two or more clearly marked lanes for traffic:

> (1) shall drive as nearly as practical entirely within a single lane; and
> (2) may not move from the lane unless that movement can be made safely.

Tex. Transp. Code § 545.060 (a).

A relatively recent plurality opinion of this Court has interpreted Section 545.060 (a) to require an operator to comply with both subsections (1) and (2), such that he must "drive as nearly as practical entirely within a single lane," whether or not movement between lanes may be made safely. *Leming*

v.State. 493 S.W.3d 552, 559-60 (Tex. Crim. App. 2016) (Part II of the *Leming* opinion gained only four votes and is a plurality opinion). This Court further explained that failing to stay entirely within a single lane is not an offense if it is prudent to deviate to some degree to avoid colliding with an unexpected fallen branch or a cyclist who has strayed from his bike lane. *Id*.

Although plurality opinions do not constitute binding authority, they "may nevertheless be considered for any persuasive value they might have." *Unkart v. State*, 400 S.W.3d 94, 100–01 (Tex. Crim. App. 2013). The State would suggest that the reasoning of the plurality in *Leming* is persuasive. Moreover, the deciding vote on the Court of Criminal Appeals did not clearly disagree with this reasoning, but rather accepted the alternative ground which justified the stop based on suspicion of DWI.

Moreover, in addition to the reasons set forth in *Leming*, the State would suggest as well the following reasons for interpreting Section 545.060 (a) to require a driver to avoid swerving into or over lane markers, regardless of whether such swerving may be done safely under the circumstances.

In construing a statute, a Court may consider among other matters the: (1) object sought to be attained; and (5) the consequences of a particular construction. Tex. Gov't Code § 311.023. In addition, the Court should presume that the Legislature intended for the entire statutory scheme to be

effective. *See* Tex. Gov't Code § 311.021(2); *Leming v. State*, 493 S.W.3d 552, 559 (Tex. Crim. App. 2016) (Plurality Opinion); *Mahaffey v. State*, 364 S.W.3d 908, 913 (Tex. Crim. App. 2012). To that end, under the doctrine of *in pari materia*, while all parts of a statutory scheme on the same or similar subject should be given effect and construed in harmony with each other, in the event of an irreconcilable conflict a more specific provision should prevail over a more general one. *See* Tex. Gov't Code § 311.026; *Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988); *State v. Schunior*, 467 S.W.3d 79, 83 (Tex. App.—San Antonio 2015), *aff'd*, 506 S.W.3d 29 (Tex. Crim. App. 2016).

A common sense reading of the present statute, and one consistent with the doctrine of *in pari materia*, would interpret Subsection (a)(1) to apply generally, and without any safe-movement exception, to all driving within a lane that does not involve changing or entirely leaving the lane in question, while Subsection (a)(2) and the safety and related signaling requirement apply only to lane changes or leaving the lane entirely.[1]

Specifically, the requirement in Subsection (a)(2) that a driver "may not move from the lane unless that movement can be made safely," should be read

[1] *See* Tex. Transp. Code § 545.104 (a) ("An operator shall use the signal authorized by Section 545.106 to indicate an intention to turn, change lanes, or start from a parked position.").

to apply only to changing or fully leaving the lane in question, not to merely swerving into or over the lane markers.

The State acknowledges that, whether "move from the lane" means entirely moving out of the lane and into another lane, shoulder, off-ramp, or adjacent area, or merely moving any part of the vehicle outside, across, or into the white lines dividing lanes is not entirely clear from the terms used in the statute. In the context of burglary and criminal trespass, a similar ambiguity concerning whether "enter" means a partial or entire intrusion of the body onto the property of another has been resolved by definitions specifically requiring partial intrusion for burglary, Tex. Penal Code § 30.02 (b), but intrusion of the entire body for criminal trespass. Tex. Penal Code § 30.05 (b)(1). No such definition is provided in the Transportation Code for "move from the lane," and the ambiguity remains concerning whether the phrase requires movement of the entire vehicle out of the lane in question, or merely movement of any part of the vehicle into or across the dividing lines.

However, common sense and the statutory scheme clearly suggest that Subsection (a)(2) should apply only to the equivalent of a lane change.

If taken literally and applying both subsections to the same driving behavior, the statute would suggest that a driver may never move from his lane unless both (1) it is impractical to stay in his lane for some reason *and*

(2) movement from the lane can be made safely. But, this begs the question of when it would become impractical to remain in a single lane. Surely, when the driver wishes to change lanes, it may still be "practical" for him to remain in the lane of travel, but does this mean that he may never change lanes until some circumstance actually requires him to do so? (*e.g.*, when he is in danger of running out of gas or the lane itself ends or merges)? This would be an absurd reading of the statute. A common sense reading, however, suggests that the requirement to drive within a single lane applies to the more general behavior of driving down the highway when no lane change is intended, while the separate requirements for safe movement from the lane and signaling apply to the more specific behavior of turning into another lane or portion of the highway.

In addition, drivers who are changing lanes might be expected to determine beforehand whether the lane change will be safe. However, drivers swerve between lanes because they are not being careful and attentive in the first place. There is no logical reason to encourage this behavior and it would be absurd to ascribe a statutory intent to allow drivers to be careless and swerve between lanes, but only so long as they do so safely. The prior version of the statute is illuminating in this regard, as it provided that "The driver of a vehicle shall drive as nearly as practical entirely within a single lane and

shall not be moved from one such lane *until the driver has first ascertained that such a movement can be made with safety*." Tex. Rev. Civ. Stat. Article 6701d, § 60(a); Acts1947, 50th Leg., ch. 421, § 60, p. 978 ("Uniform Act Regulating Traffic on Highways") (emphasis added). Common sense suggests that swerving within and between lanes is not planned driving behavior and it would be absurd to suggest that a driver may swerve in this manner if he has "first ascertained that such a movement can be made safely." Changing lanes, on the other hand, is exactly the sort of planned behavior to which this portion of the statute logically applies.

Finally, the object sought to be obtained is the safe movement of traffic, but the majority of the rules of the road do not allow for subjective determinations about safe movement. The requirements that a driver stop at a stop sign or red light make no provision for disregarding those devices even if the driver determines it can be done safely. Likewise, lines are painted to divide the lanes for a purpose, and drivers are expected to abide by those lanes as best they can, and not to disregard them simply because they think it can be done safely. The opposing construction would turn the lane markings into little more than suggestions rather than directives. Moreover, the requirement for signaling an intention to change lanes would also be rendered largely meaningless if a driver could swerve back and forth across lanes without

signaling.

For all of these reasons, the Subsection (a)(1) requirement for an operator to drive as nearly as practical entirely within a single lane should not be read as subject to a Subsection (a)(2) safe movement exception in the absence of a complete and properly signaled lane change.

PRAYER FOR RELIEF

For the foregoing reasons, the State requests that the Court: grant this petition for discretionary review; set this case for submission without oral argument; and, after submission, reverse the judgment of the Court of Appeals and remand to that Court for proceedings consistent with the opinion.

Respectfully submitted,

/s/ *Douglas K. Norman*

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RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this petition, excluding those matters listed in Rule 9.4(i)(1), is 1,744.

/s/ *Douglas K. Norman*

_____

Douglas K. Norman

CERTIFICATE OF SERVICE

This is to certify that, pursuant to Tex. R. App. P. 6.3 (a), copies of this petition for discretionary review were e-served on August 1, 2019, on Respondent's attorney, Mr. Donald B. Edwards, at mxlplk@swbell.net**,** and on the State Prosecuting Attorney, at Stacey.Goldstein@SPA.texas.gov.

/s/ *Douglas K. Norman*

_____

Douglas K. Norman

APPENDIX 1. Thirteenth Court of Appeals Opinion

NUMBER 13-18-00244-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

SHEILA JO HARDIN, **Appellee.**

On appeal from the 319th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Hinojosa

The State of Texas appeals the trial court's order granting appellee Sheila Jo Hardin's motion to suppress evidence following a warrantless traffic stop. In a single issue, the State argues that the trial court erred in concluding that the detaining officer lacked reasonable suspicion to believe that Hardin committed a traffic offense by failing

to maintain a single lane of traffic. *See* TEX. TRANSP. CODE ANN. § 545.060. We affirm.

I. BACKGROUND

A grand jury returned an indictment charging Hardin with the following offenses: fraudulent possession of identifying information, *see* TEX. PENAL CODE ANN. § 32.51, and forgery of a government instrument. *See id*. § 32.21. Hardin subsequently filed a motion to suppress evidence obtained during the traffic stop.

David Alfaro, an officer with the City of Corpus Christi Police Department, was the State's sole witness at the suppression hearing. Officer Alfaro testified that he observed a U-Haul truck at around 1:19 a.m. parked at a fast food restaurant in Corpus Christi, Texas. He recalled that he had received a notice to "be on the lookout" (BOLO) for a U-Haul that was suspected of being involved in multiple burglaries. Officer Alfaro followed the U-Haul in his marked patrol car onto I-37, and he later observed the vehicle's tires cross the white line into the adjacent lane for a "couple seconds." Officer Alfaro then initiated a traffic stop based upon his suspicion that the vehicle's driver committed the offense of "failure to maintain [a] single lane of travel."

The trial court admitted into evidence the dash-cam video from Officer Alfaro's patrol vehicle, which it then viewed. The video depicts Hardin's vehicle traveling in the center lane of a three-lane divided highway. There are no other vehicles visible on Hardin's side of the highway for the duration of the video. The passenger side rear tire of Hardin's vehicle can be seen straddling the lane divider shortly after rounding a curve. The vehicle then moves slowly toward the opposite lane divider, while remaining in its lane. At this point, Officer Alfaro activates his patrol lights, and Hardin responds by

exiting the highway and pulling over.

The trial court signed an order granting Hardin's motion to suppress, which was supported by the following findings of fact and conclusions of law:

FINDINGS OF FACT.

> 1. The trial court finds credible the testimony of Corpus Christi Police Officer D. Alfaro that on April 23, 2017, he observed Sheila Jo Hardin's vehicle traveling on the highway in front of him in the marked center lane of travel, and that he initiated a traffic stop for failure to maintain a single lane after he observed Hardin's tires cross over the striped lines marking the center lane without Hardin signaling a lane change, although there were no other vehicles in the vicinity at the time or any other circumstance to suggest that this movement was unsafe. The trial court further finds that a video recording of Hardin's vehicle made at the time of these observations and entered into evidence at the hearing on [the] motion to suppress supports Officer Alfaro's testimony.
>
> 2. The Court further finds there was no evidence concerning the time of alleged burglaries or the BOLO regarding the U-Haul, the source of the information that a U-Haul was involved in burglaries in the area; or the reliability of the source, and there was no description of the vehicle regarding size, license plate, etc., from which an officer could reasonably suspect Defendant's vehicle might be involved in or have evidence of criminal activity.

CONCLUSION OF LAW.

> The trial court concludes that Officer Alfaro lacked reasonable suspicion to detain Hardin at the time he initiated a traffic stop and that all evidence obtained as a result of this illegal detention should be suppressed.

This interlocutory appeal followed. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5).

II. DISCUSSION

The State argues that the trial court erred in concluding that Officer Alfaro lacked

reasonable suspicion to stop Hardin for committing a traffic offense.[1] Specifically, the State maintains that "[f]ailure to maintain a single lane, whether or not it can be done safely, is a traffic violation which in itself provided reasonable suspicion for Officer Alfaro to stop Hardin."

A. Standard of Review and Applicable Law

The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV. A warrantless traffic stop is a Fourth Amendment seizure analogous to a temporary detention, and it must be justified by reasonable suspicion. *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011). An officer may conduct a traffic stop if the officer has reasonable suspicion that the person has committed a traffic violation. *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992). Reasonable suspicion exists if the officer has specific, articulable facts that, combined with rational inferences from those facts, would lead the officer to reasonably conclude that the person is, has been, or soon will be engaged in criminal activity. *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007). This is an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). A reasonable-suspicion determination is made by considering the totality of the circumstances. *Curtis v. State*, 238 S.W.3d 376, 379 (Tex. Crim. App. 2007).

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We afford

[1] The State does not maintain on appeal that the BOLO provided Officer Alfaro with reasonable suspicion to stop Hardin, nor does it challenge the trial court's finding in that regard.

almost total deference to a trial court's determination of historical facts when supported by the record, but we review pure questions of law de novo. *Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012). Likewise, we give almost total deference to a trial court's resolution of mixed questions of law and fact if those questions turn on the credibility and demeanor of witnesses. *Id*. However, if credibility and demeanor are not necessary to the resolution of a mixed question of law and fact, we review the question de novo. *Id*. We apply this deferential standard to videotape evidence admitted at a suppression hearing when that videotape recording was used to determine historical facts. *Tucker v. State*, 369 S.W.3d 179, 185 (Tex. Crim. App. 2012). This standard requires that we defer to the trial court's finding on whether a witness actually saw or heard what was depicted in a videotape. *State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013). But we may reject a trial court's fact finding if it is contrary to "indisputable visual evidence." *Id*.

Here, whether there was reasonable suspicion to detain Hardin is not a function of Officer Alfaro's demeanor or credibility, but of the legal significance of the uncontested facts. Therefore, we review de novo the ultimate question of whether Officer Alfaro was justified in stopping appellant's vehicle. *See State v. Ford*, 537 S.W.3d 19, 23 (Tex. Crim. App. 2017) ("[W]hether the facts, as determined by the trial court, add up to reasonable suspicion . . . is a question to be reviewed de novo.").

B. Analysis

Section 545.060(a) of the transportation code provides that "[a]n operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly

as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be made safely." TEX. TRANSP. CODE ANN. § 545.060(a). We have previously held that "weaving somewhat in one's own lane of traffic," without evidence indicating that such movement was unsafe, does not furnish an officer with reasonable suspicion of a § 545.060(a) violation. *State v. Cerny*, 28 S.W.3d 796, 801 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.); *see also State v. Alvarez*, No. 13-14-00061-CR, 2015 WL 4593832, at *4 (Tex. App.—Corpus Christi–Edinburg July 30, 2015, no pet.) (mem. op., not designated for publication).

In *Cerny*, a state trooper noticed the defendant's car when it "just barely" swerved across the center line into the trooper's lane of traffic. 28 S.W.3d at 798. The trooper made a U-turn, began to follow the defendant, and turned on the vehicle's dash-cam. *Id*. He then observed the car swerve over the solid white line separating the traffic lane from the right shoulder of the road three or four times. *Id*. In reviewing whether there was reasonable suspicion to conduct a traffic stop, we followed two of our sister courts' opinions which concluded that a violation of § 545.060 occurs only when a vehicle fails to stay within its lane of traffic and such movement is unsafe.[2] *Id*. While the testimony established that the defendant was weaving and had crossed partially into another lane and the shoulder, there was no evidence that his actions were unsafe. *Id*. at 801. Absent such evidence, we held that the trooper lacked reasonable suspicion to believe that the defendant committed a traffic violation. *Id*. at 801.

Subsequently, a plurality of the Texas Court of Criminal Appeals interpreted

[2] *See Hernandez v. State*, 983 S.W.2d 867, 871 (Tex. App.—Austin 1998, pet. ref'd) and *State v. Tarvin*, 972 S.W.2d 910, 912 (Tex. App.—Waco 1998, pet. ref'd).

§ 545.060 as creating two separate offenses. *Leming v. State*, 493 S.W.3d 552, 559 (Tex. Crim. App. 2016). In *Leming*, the four-judge plurality[3] stated:

> [I]t is an offense to change marked lanes when it is unsafe to do so; but it is also an independent offense to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so, regardless of whether the deviation from the marked lane is, under the particular circumstances, unsafe.

Id. at 559–60. Plurality opinions have persuasive value, but they do not constitute binding authority. *Vasquez v. State*, 389 S.W.3d 361, 370 (Tex. Crim. App. 2012). We are bound by this Court's prior holding absent an intervening and material change in the statutory law or a decision from a higher court or this Court sitting en banc that is on point and contrary to the prior panel decision. *In re Estrada*, 492 S.W.3d 42, 48 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.); *Medina v. State*, 411 S.W.3d 15, 20 n.5 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Because *Leming*'*s* plurality opinion is not binding authority, *Cerny* remains controlling precedent. *See State v. Bernard*, 503 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2016) (concluding that the Fourteenth Court of Appeals was bound by its own precedent which was contrary to the *Leming* plurality's construction of § 545.060 of the transportation code), *judgment vacated on other grounds*, 512 S.W.3d 351 (Tex. Crim. App. 2017).

Here, after viewing the dash-cam video and hearing Officer Alfaro's testimony, the trial court found that Officer Alfaro observed the tires of Hardin's vehicle cross minimally into an adjacent lane after rounding a curve in the road. The trial court further found that Hardin's actions were not unsafe, a finding the State does not challenge on appeal and

[3] A majority of the justices failed to join only Part II of the *Leming* opinion, which interpreted § 545.060 of the transportation code. *Leming v.State*. 493 S.W.3d 552 (Tex. Crim. App. 2016).

which is supported by the record. Therefore, in accordance with this Court's precedent, we conclude that Officer Alfaro did not have reasonable suspicion to stop Hardin for violating § 545.060 of the transportation code. *See Cerny*, 28 S.W.3d at 801. Because this was the only articulated basis for the detention, we hold that the trial court did not err in granting Hardin's motion to suppress. We overrule the State's sole issue.

III. CONCLUSION

We affirm the trial court's suppression order.

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
1st day of August, 2019.